

The Legality of the International Use of Force by and from States

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The question posed is the most important issue in world politics: under what circumstances may states lawfully resort to the unilateral (and international) use of force?

If Articles 2(4) and 51 of the Charter of the United Nations were in fact part of the living law of the world community, the question would be easy to answer. Then one could say with assurance that customary international law, *jus gentium*, the law distilled from the consent of the nations, had embraced Article 2(4) as a norm and allowed states to use force unilaterally only in exercising their inherent and sovereign rights of self-defense, which Article 51 says are not impaired in any way by the Charter, and in carrying out “decisions” of the Security Council. Under such circumstances, states could, for example, lawfully protect their citizens abroad, intervene in situations of chaos or near chaos to restore order, and participate in programs of collective self-defense like those of NATO or SEATO and the campaign to protect South Korea which began in 1950. Correspondingly, it could be said with confidence that states could not use force internationally to attack the territorial integrity or political independence of other states, nor allow their territory to be used for the purpose by armed bands, terrorists, or guerrillas, whether idealists or mercenaries, whose goal was to weaken or overthrow the government of the victim state.

But *is* Article 2(4) now a norm of international law?

No statement can be considered a rule of law unless it is effectively enforced—that is, unless the legal system responds to a breach by genuinely attempting to vindicate the purported norm. Thus in all states the statute against murder is a true norm of law although many murders occur, and not all murderers are captured and punished. A proposition in the form of a rule of law can be considered a legal norm even if it is not universally respected and enforced; but it cannot be characterized as a norm if respect and enforcement are the exceptions rather than the rule.

By this standard, the status of Article 2(4) as law is now in doubt. Its

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text, condemning the use of force against the territorial integrity or political independence of any state, surely purports to be a legal norm. And the pattern of international behavior reveals that many states do habitually comply with the rule of Article 2(4). But does it in fact reflect the will of the states and the general pattern of state practice? Does the society of nations effectively oppose breaches of the nominal rule, and seek to prevent acts which would violate it? Should the proposition advanced in Article 2(4) now be considered not a current norm but an aspiration for the international legal system, a guide to its future development? Or is it no more than a utopian dream?

Article 2(4) of the Charter covers any and all uses of force or threats to use force against the territorial integrity or political independence of states—not only by means of visible armed attacks across state frontiers, but also by means of assistance to any kind of insurrections against the authority of the state under attack, including support for terrorists who disrupt public order or assassinate officials. It includes not only actual attacks but situations which the victim state perceives to be a threat of force—for example, the secret deployment of missiles in Cuba by the Soviet Union in 1962, which was neither an “armed attack” nor the threat of an armed attack on the United States, since the state of the nuclear balance in 1962 made a Soviet nuclear attack on the United States inconceivable.

These rules derive from the nature of the state system. For centuries they have been considered indispensable to the peaceful cooperation of states. Violating these rules has always been treated as *casus belli*. This remains the case under the Charter, as is reaffirmed in all the studies, commission reports, and resolutions which have considered the problem of aggression under United Nations auspices since the Charter was adopted. For example, sending armed bands across a frontier to attack the authority of a state, or failing to prevent such activities, as one of those Reports said, is “a crime against humanity.” Under Article 51, a state which perceives the act or failure to act of another state as a breach of Article 2(4)—there being no practicable peaceful remedy for the breach—may use a reasonable and proportional amount of force by way of self-help to eliminate the threat caused by the violation until the Security Council decides otherwise. There is no requirement of Security Council approval before force is used in self-defense.

Article 2(4) and Soviet Non-compliance

Since 1945, when the Charter of the United Nations was adopted, the pattern of state practice has been clear. The Soviet Union has taken the

position that Article 2(4) does not apply to it, and has committed acts of aggression in violation of Article 2(4) hundreds if not thousands of times. Many people assume that these familiar actions have somehow been legitimated. But they cannot be reconciled with the policies and purposes of the Charter. And they have not yet been legitimated by what Professor Richard Falk once called the "normative silence" of the state system.

For many years, a number of the most important Soviet acts of aggression were opposed and resisted by the United States and other nations willing to rally to the cause of law. Thus, the Soviet Union's early post-war probes against Iran, Greece, and Turkey were thrown back, the attack on Berlin defeated, and the invasion of Korea repelled. But since the tragic experience of the West with collective security in Korea and Vietnam, the policy of containment initiated by President Truman has flagged. It remains the nominal goal of the regional coalitions which have been organized around the nuclear power of the United States to deter and if necessary defeat Soviet or Soviet-inspired aggression in strategically important areas of the world. But it has become common—as was the case during the 1930's—for friends and adversaries of the United States alike to wonder whether the industrialized democracies would actually fight to protect their vital interests. Such doubts in themselves constitute a persuasive invitation to war.

Since the withdrawal of the United States from Vietnam, the Soviet program of expansion has gained in momentum. That program, fueled by the aggressive use of force, and backed by the menace of nuclear and chemical weapons, has gone too far, threatening the balance of power on which the hope of peace depends. And the Soviet practice of aggression is contagious. Iraq's armed attack on Iran and Argentina's armed attack on the Falkland Islands are two among many recent episodes of aggression outside the immediate ambit of the Cold War. Unless the practice of aggression is decisively stopped, Article 2(4) of the Charter will soon cease to have any influence on the behavior of states, and we shall be living once more in a condition of Hobbesian anarchy.

The Western states do not want this outcome; indeed, they fear it profoundly. Anarchy has always led to general war and to the emergence of tyrannies. But the Western nations will have no choice unless the Soviet Union gives up its futile quest for empire and undertakes to live peacefully within its legitimate boundaries as a responsible member of the United Nations. The democracies will not sit by while they are "nibbled to death," in Adlai Stevenson's phrase.

Despite the constant pressure of Soviet aggression, the Western nations have not yet abandoned Article 2(4). The forces resisting such a

step are immensely powerful in the mind of the West. But the West will be drawn into the whirlpool if the slide towards anarchy continues. The recent uses of force by the United States, for example, are entirely justified under Article 51 and the precedent of our actions during the Cuban Missile Crisis of 1962. In the Grenada operation, beyond the threat to American nationals, the appeal of the Governor-General for help, the disintegration of public order in Grenada, and the reaction of the nearby island states, the United States perceived a build-up of hostile forces comparable to that involved in the Cuban Missile Crisis, and reacted with proportional force to eliminate the threat at minimal cost. And in Nicaragua, the active role of that country in supporting the insurrection against the government of El Salvador alone justifies American assistance in ending the attack. Self-defense in international law fully accepts the right of the party attacked to deal with the delict as circumstances may require. It is certainly free to enter the territory of its attacker if necessary to eliminate the breach. This is the moral of the *Caroline* case.¹

Secretary Shultz's speech of February 22, 1985 in San Francisco may in part go beyond Article 51. He points out the absurdity of the Soviet position in claiming a legal right to support insurrections against Western governments while denying a parallel right to the United States and its allies.² Secretary Shultz's comment is a fair warning of trends to come if the Soviet drive for dominion continues.

Moreover, the United States is altogether correct under the Charter in refusing to submit to the jurisdiction of the International Court of Justice (I.C.J.) in the Nicaragua case. The Charter system vests jurisdiction in the Security Council to deal with acts of aggression, breaches of the peace, and threats to the peace. The member states delegate authority to the Council to deal with such matters, and agree to abide by the Council's "decisions" respecting them. Under Article 51, members have the right to exercise their right of self-defense until the Security Council—not the I.C.J.—overrules their action. Article 2(4) is a derogation of the sovereignty of all states, and a limitation on their historical freedom to use force both for aggression and in self-defense. As an exception to the normal rule of state sovereignty, that exception should be meticulously interpreted. These dispositions, like the Security Council veto of its permanent members, reflect structural reality: the state system necessarily rests on the will of the great powers. Of course, in attempting to preserve or restore peace, the Council may refer questions to the I.C.J. or recom-

1. 2 J. MOORE, *DIGEST OF INTERNATIONAL LAW* 409 (1906).

2. N.Y. Times, Feb. 23, 1985, at A4, col. 1.

mend that the parties take issues to the I.C.J., as was the case in *Corfu Channel*³ and the *Namibia*⁴ cases. This is an entirely different matter from an unjustified assumption of jurisdiction by a tribunal which, like all other international tribunals, can exercise its functions only upon the consent of the sovereign parties.

Article 2(4) and the Future of the State System

In its modern form, the state system evolved from the efforts of the leaders of the Congress of Vienna and some of their nineteenth century successors. The Vienna system collapsed in 1914 and was reconstituted and reformed in 1919 under the League of Nations. It collapsed again in the 1930s and was recreated for a second time under the Charter of the United Nations in 1945. Now the Charter of the United Nations is going the way of the Covenant of the League. For the Western nations to abandon the Charter as a guide to their own behavior under the pressure of the Soviet thrust for power would be a catastrophe, signalling the complete breakdown of the state system as a system of peace. In the nuclear environment, that process threatens civilization itself.

At this moment, then, it is impossible to determine whether Article 2(4) of the Charter is an operative legal norm. On the other hand, it has not yet disappeared either as an influence on state behavior or as an aspiration for international law. Indeed, its restoration and fulfillment as the keystone of the state system envisioned by the Charter is necessarily the highest ambition of the foreign policies of the United States and its allies in the Atlantic and Pacific Basins, of China, and of most of the smaller states in the world. The urgency of that task is underlined by the shadow of the nuclear weapon. The major risk of nuclear war is through the escalation of conventional war. No one can guarantee that the fallible human beings who control both nuclear and conventional weapons could indefinitely refrain from using nuclear weapons under the stress of battle. It follows, therefore, that it will be impossible to eliminate the serious risk of nuclear war without eliminating war itself.

The question which invited my comments cannot be answered at this time. The future course of world politics will determine—for a long time to come—whether we soon achieve a state system in which aggression is effectively forbidden by international law, or whether we are forced to live in a condition of international anarchy, in which states are as free as they were in the eighteenth century to make war at will.

3. (U.K. v. Alb.), 1949 I.C.J. 4.

4. 1971 I.C.J. 16.